Neutral Citation Number: [2021] EWCA Crim 564

Case No: 201901609 B2 & 202000683 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM the Crown Court at Canterbury
Mr Recorder Jonathan Davies
T20170037

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/04/2021

Before:

VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE JEREMY BAKER
and
MR JUSTICE GRIFFITHS

- -

Between:

Adrian Fanta	**First Appellant**
and	
Gabriel Iutes	**Second Appellant**
- and -	
The Queen	**Respondent**

- -
- -

Mr B Kelly Q.C. and Ms F Kenyon (instructed by **Henningans Solicitors**) for **the First Appellant**
Mr N Beechey (assigned by the **Registrar of Criminal Appeals**) for **the Second Appellant**
Mr A Johnson (instructed by **CPS Criminal Appeals Unit**) for the **Respondent**

Hearing dates: 11th March 2021

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Approved Judgment

Lord Justice Fulford VP:

Introduction

1. On 25 May 2018 in the Crown Court at Canterbury before Recorder Jonathan Davies and a jury the applicants, Adrian Fanta (now aged 35) and Gabriel Iutes (now aged 23), were convicted of being knowingly concerned in the fraudulent evasion of a prohibition on the importation of goods (cocaine) contrary to section 170(2) Customs and Excise Management Act 1979.

2. On the same day they were each sentenced to 11 years' imprisonment.

3. Mr Fanta applies for an extension of time of 312 days for leave to appeal against conviction, his case having been referred to the full court by the single judge. Mr Iutes applies for an extension of time of 612 days to appeal against his conviction, his case having been referred to the full court by the Registrar.

The Facts

4. On 9 September 2015 in Cochera, France, a lorry bearing Romanian number plates (TMX 16 WXE), was randomly stopped by UK Border Force Officers. The trailer was scanned. Mr Fanta was driving the tractor. He produced a handwritten CMR document to the Border Control Officers (this is, in effect, a consignment note which gives an outline of the nature of the load being carried). It did not accord with the original typed version; in particular, it created the untrue impression that the lorry had been loaded on 9 September 2015 rather than 2 September 2015 as was, in fact, the case. An anomaly in the load was noted. On examination, whilst the trailer legitimately had approximately 24 tonnes of wheat starch on board, 2 hidden supermarket carrier bags were discovered which contained 15 kilograms of cocaine with a street value of over £2 million and a wholesale value of £500,000.

5. A further carrier bag was found in the tractor cab; this was from the same supermarket chain as one of the bags which contained the drugs found within the load. Mr Iutes's fingerprint was on this bag, although he was not in the vehicle and was accordingly arrested later in the investigation.

6. Michael Trott, the prosecution's tachograph expert, gave evidence as to the movements of the lorry from 1 to 9 September 2015. Much of his evidence was uncontroversial. It revealed an inconsistency, however, in that Mr Fanta had said that he met Mr Iutes in Ghent on 3 September 2015 whereas the tachograph showed that the lorry was not in Ghent on that date but at Les Bulles. Mr Trott was satisfied that on 1 September 2015 – at which point Mr Iutes's driver's card was being used in substitution for Mr Fanta's – the vehicle was driven from Belgium to Holland, where it was parked overnight. On 2 September 2015 after various manoeuvres in the Sas van Gent area, it was driven back to Les Bulles. The typed CMR document recorded the load being collected on that day. The vehicle remained in Les Bulles from 2 to 9 September 2015. On 3 September 2015 the lorry was manoeuvred in the vicinity of Les Bulles.

7. Fanta used a satellite-navigation device for a trip to Romania, starting on 3 September 2015. On 8 September 2015 the device was in Austria and from there a destination of Les Bulles was selected. It was seized from the cab of the lorry TMX 16 WXE when Fanta was stopped by the authorities.

8. In the early hours of 9 September, with Mr Iutes's card being used, the lorry TMX 16 WXE was driven from Les Bulles to Sas van Gent, making two stops in the area, although neither were small manoeuvres of the sort one might expect if the vehicle was simply being loaded. At Henri Farmanstraat in Ghent, the tachograph showed that Mr Iutes's card was removed and Mr Fanta's inserted. The tracker log recorded the route travelled by the lorry towards the Channel Tunnel. The prosecution submitted the journey to Sas van Gent was a "*distractionary diversion*", designed to facilitate the lie that the vehicle was driven from the point of loading to the frontier controls.

9. Mr Fanta was arrested and interviewed. He denied any wrongdoing and said that he worked with his father and owned a company called CSM Trams which had been in operation since 2011. He stated that he leased two tractor units and had secured work via a website for a Romanian company, Fircam. He had previously worked for this company. As regards the present events, he was required to collect a lorry from a company called Cargill in Holland and to deliver it to a company called Hi Kim in Devon. He had obtained the details of Mr Iutes from a Romanian website of drivers who were available for work. In August 2015 Mr Fanta met Mr Iutes in a car park in Romania to discuss the possibility of the latter working for Mr Fanta. Some two weeks later they met again, and Mr Fanta gave Mr Iutes the keys to the lorry TMX 16 WXE at Les Bulles, and he agreed to pay him €50 per day. Mr Iutes had shown him some paperwork.

10. Mr Fanta maintained in interview that he had, in the event, driven the lorry because Mr Iutes had been unable to undertake the journey. Mr Fanta had then been delayed because he lost his National Identity Card and had returned to Romania for a replacement.

11. Although he suggested to the officers that he knew nothing about Mr Iutes, he was unable to explain why the latter's details were stored in his mobile telephone or why they were under the name "Cocoss." There was conflicting evidence in the case as to whether this potentially referred to "cocaine" or whether it was the Romanian word for a male chicken.

12. Mr Iutes in interview suggested that he met Mr Fanta by chance in a shopping mall in Timisoara. He denied he had put an advert online advertising for work as a driver. He told the officers (during a somewhat inconsistent account) that he had driven the lorry to a location near Antwerp for it to be loaded with some sort of powder. He had returned the vehicle to Mr Fanta. He denied any knowledge of the drugs and said he might have touched the bag in the cab on which his fingerprints were found.

13. Mr Fanta gave evidence at trial that he had created a company in Romania called CFM Transport. He purchased two lorries, one of which he had been driving on 9 September. There were two sets of keys for the vehicles. Over time, he had employed other drivers on full time contracts. He co-ordinated their work, although he also acted as a backup driver. Since 2013 a company called Ewals had provided him with work, usually in Germany and the Benelux Union. When necessary, he visited Romania to obtain the equivalent of an MOT for the vehicles. He had no particular storage site for his lorries, although he parked them from time to time in Les Bulles in Belgium where he knew the

owner of premises, a man he referred to as Vasile. This was where, during August and September 2015, the lorry in the instant case was parked.

14. Bursa Transport was the client for the present trip, having placed an advert on their website. The fact that Mr Fanta's card had been put into the tachograph did not mean that he was with the vehicle at the time between 28 August 2015 and 1 September 2015, and he denied having been with the lorry during that period. It had been arranged by telephone that Mr Iutes was to drive the load.

15. Mr Fanta expected the goods to be delivered on 2 September 2015. However, he received a telephone call from Mr Iutes during which the latter said that he would be unable to undertake the journey because of a "*family problem*." Mr Fanta did not question this as he had had "*all sorts of unpleasant experiences with drivers.*" He decided to deliver the goods himself. He gave instructions to Mr Iutes to take the lorry to Les Bulles. Mr Fanta arrived on 3 September 2015, but he then realised he needed to travel to Romania to collect a new identity card. He produced at trial his identification card which showed a date consistent with this account (8 September 2015). Although he saw Iutes on 3 September 2015, they did not discuss why he was unable to undertake the journey. Mr Fanta joined the lorry near Ghent on 9 September 2015, Iutes having been asked to drive as far as he could towards Calais. Mr Fanta placed the seal on the lorry.

16. He was questioned as to a message sent to the company with whom he had contracted to transport the load: "*Driver lost all document. I sent other driver. Now he crossing GB. Later or tomorrow will be at unloading place. I holiday. Arrive yesterday at office. Thousand apologies."* Mr Fanta explained that the reference to lost documents and the other driver were references to himself. He suggested he was trying to explain why the load was delayed without going into too much detail.

17. He accepted that he had written the CMR when he took over the journey on 9 September 2015. This was for his own records. He accepted that there were errors in the details supplied.

18. When he arrived in Coquelles he had crossed through to the British Border Control where the vehicle was selected for testing. He had indicated to the officials that he had not stopped, by which he meant that he had not stopped on the way to Calais. In relation to the CMR, he handed over the handwritten version because he had personally written it. There was no other reason why he had not handed over the typed version.

19. He accepted that in the first three interviews he had not told the truth as to where the lorry had been parked between 3 and 9 September. He said that he did not wish to be associated with the drugs because this would have led to his being unable to return to Les Bulles. He did not want to mention anything about the garage in Les Bulles. He had lied about giving the keys to Iutes.

20. In cross-examination by counsel, Mr Body (for Mr Iutes), Mr Fanta said it had not occurred to him that Vasile might be responsible for the drugs and he rejected the suggestion that he had been "*in on it*." When cross-examined by counsel for the Crown, he suggested that significant parts of Mr Iutes's case involved lies by the latter, who he blamed for loading the drugs.

21. Mr Iutes testified that he was a professional driver and lived in Maidstone. He worked for a company called Opal Dial. He had driven lorries within Europe many times and often

tried to combine these trips with his return to Maidstone. He said he had met Mr Fanta in Timisoara. He had been on his way back to the UK in his own vehicle when he overheard a discussion between Mr Fanta and others as to a shortage of drivers. He showed Mr Fanta his driving licence and the latter promised to ring him saying that there was a possibility of work. There had been no previous contact between them.

22. He subsequently received a telephone call from Mr Fanta asking him to meet him at an address in Belgium. Mr Iutes decided to go there early as it was on his way back to the United Kingdom. He met a man called Vasile who was a friend of Mr Fanta's. Mr Iutes undertook some work for him and was given lodgings. He received a message from Mr Fanta via Vasile to load the lorry with wheat flour in Sas van Gent. He then drove the lorry to Holland, loaded it and returned to Les Bulles. There had not been a definite offer of work at this stage. He continued assisting Vasile, hoping that work from Mr Fanta would transpire. His evidence was that he had not agreed to take the lorry to England and at no stage had he said that he had family problems.

23. On 3 September 2015 Mr Fanta arrived in Les Bulles but after an hour or so he realised that he had left his ID card in Romania and would have to return. Mr Iutes stayed in Les Bulles and Vasile asked him to drive the lorry towards Calais to save Mr Fanta driving hours. Mr Iutes drove to the loading place because he knew there would be a parking space. Mr Fanta subsequently rang him and told him to go to the address of a company called Ewals. He did so, gave the lorry to Mr Fanta and returned to Les Bulles.

24. He had looked in the cupboards inside the lorry and had innocently touched the bag on which his fingerprint was found. He had no knowledge of how the drugs were put into the lorry.

25. It follows that the accounts of the two appellants were markedly at variance. The defence for each applicant, moreover, was not simply that he was an innocent "*dupe",* lacking any responsibility for the drugs found on the trailer. Instead, they implicated each other in this offending. During Mr Fanta's evidence, whilst being cross-examined by Mr Wright, he blamed Mr Iutes for placing the drugs on the vehicle:

> "MR WRIGHT: Well, there were only two people involved with that lorry, weren't there; there was you and Mr Iutes.
> INTERPRETER: Yes.
> MR WRIGHT: There were only two people involved in that load of 24 bags of wheat starch, weren't there?
> INTERPRETER: The loading was performed by (inaudible) yes.
> MR WRIGHT: That wasn't quite the question I asked. Both of you were involved with that vehicle that had the 24 bags of wheat starch, weren't you?
> INTERPRETER: Yes.
> MR WRIGHT: Nobody else was involved?
> INTERPRETER: No.
> MR WRIGHT: No. You say it's not you.
> INTERPRETER: Yes.
> MR WRIGHT: Then who's left?
> INTERPRETER: Iutes.
> MR WRIGHT: Yes. So are you saying that if it wasn't you it was Mr Iutes?
> INTERPRETER: It is a possibility.

MR WRIGHT: Well, what other possibility is there?
INTERPRETER: I don't know."

26. Although Mr Fanta tried in this passage to hedge the position slightly, the exchange involved the clearest implication of Mr Iutes. Mr Fanta contended that his friend Vasile was uninvolved with the cocaine. Mr Body suggested during cross-examination of Mr Fanta that he had put the cocaine on the lorry whilst en route to Calais ("*You weren't loading drugs then, into your lorry?*) and that he was telling lies because he was in trouble, thereby blaming someone else. In his speech to the jury, Mr Body contended that it was most likely that either Vasile or Mr Fanta had placed the drugs on the vehicle. Mr Body accused Mr Fanta of a pattern of deceit. It follows that the case of each appellant was that his co-accused had either committed the offence or was likely to have done so. This was, therefore, a paradigm "*cut-throat*" defence.

27. In this regard, it is revealing to note that on 8 February 2018 there was an application to break the trial date. Mr Iutes was in custody in Spain and the Crown Court Attendance Note reveals that Judge O'Mahoney ordered a joint trial given there were cut-throat defences. As a result, the trial date of 5 March 2018 was broken and the case was refixed for 14 May 2018. It appears, therefore, that the court fully appreciated the inevitable nature of the defences to be advanced.

The Bad Character Application

28. Against this background, on 4 September 2017 Mr Keogh, who represented Mr Fanta at trial, uploaded an application for evidence of Mr Iutes's bad character to go before the jury. Perhaps unsurprisingly, this was opposed by Mr Iutes. The evidence in question related to an importation of 43 kilograms of cocaine into the UK on 18 July 2015 (some 6 weeks before the present importation). A fingerprint of Mr Iutes had been found on a cash receipt in the cab of the lorry from which the drugs were seized. Mr Iutes maintained that his print was on the receipt because he had provided some assistance (at the request of his employer) to a new driver he had not met before. The driver was a Romanian man, Savin Bulubasa, who was employed by a transportation company called Opal Dyall. The cash receipt was for a return ferry ticket bought by Mr Iutes from an agency in Dover on 14 July 2015 (*viz*. four days before the importation of cocaine). The company was called Kadir Demir Ltd, a road transportation company operating in the UK, Western Europe and Turkey. Just over a month earlier, on 9 June 2015, Mr Bulubasa had entered the United Kingdom driving the lorry at 3.20pm (Calais to Dover) and Mr Iutes arrived on the same day at 8.15pm in a BMW motor car (Calais to Dover).

29. Mr Bulubasa, who coincidentally had been represented by Mr Keogh at his trial, was acquitted of this importation of drugs. His acquittal was set out in the schedule of relevant non-sensitive unused material in the present trial at item 109, *"Bulubasa was charged with being knowingly concerned in the importation* (of cocaine) *and subsequently stood trial at Snaresbrook Crown Court in January 2016. The jury returned a verdict of not guilty."* This record was prepared by the prosecution and was available to all counsel and solicitors in the present trial. When Mr Keogh represented Mr Bulubasa he was unaware of the existence of Mr Iutes, still less that his fingerprint was

on the receipt in the lorry's cab. He became aware of this via item 116 on the schedule to which we have just referred, "*Further to Item 109 above, relating to Savin BULUBASA and detection of 43.25 Kg of cocaine. A piece of paper found in the cab of Bulubasa's tractor unit – specifically a cash payment receipt to be presented to the ferry company for travel, referenced KC/01/18/07/15 was found to contain a fingerprint matching that of Gabriel Ionut IUTES DOB 05/01/1977*". The entry on the schedule was dated 19 April 2017 by the officer who completed it and it was signed by the reviewing lawyer on 28 April 2017. Mr Keogh received what is called a "*Fingerprint Identification Notification*".

30. The application was made pursuant to section 101(1)(e) Criminal Justice Act 2003 ("*CJA*"), which provides that:

> **"101 Defendant's bad character**
>
> (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> […]
>
> (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
>
> […]

31. In the written application, the matter was put as follows:

> "This is a cut throat case in which Fanta immediately in police interview suspects Iutes as responsible for the placing of the cocaine in the load. The issue as between defendants is which of them put the cocaine in the load. Iutes' print is on a bag in the (lorry) cab; that bag is of the same type as the bag wrapping the cocaine in the load. The discovery of Iutes' print in a cocaine load (cab) 6 weeks earlier has substantial probative value on the issue of which of the defendants has an association with cocaine smuggling and which put the cocaine in this load."

32. Mr Body, on behalf of Mr Iutes, maintained in his written response to the application that as far as his lay client was concerned there was no cut-throat defence: "*It is not Mr Iutes case that Mr Fanta is responsible for the drugs being in the lorry it is his case that he is not responsible and does not know who is*." However, we interpolate to observe that in the event neither applicant identified a potentially credible "third party" who had the opportunity to place the drugs on the lorry and to retrieve them on arrival in the UK. It is unremarkable in those circumstances – indeed, we would suggest it was inevitable – that Mr Body was, in due course, to allege repeatedly that Mr Fanta bore responsibility for the importation of the drugs.

33. Section 112 CJA defines an "*important matter*" as "*a matter of substantial importance in the context of the case as a whole*." Therefore, the judge assessed whether the evidence of Mr Iutes's bad character was of substantial probative value, and he posed for himself the question whether the evidence had an enhanced capacity to prove or disprove a fact in issue. He indicated that the purpose of the first requirement under section 101 (1) (e) was to ensure so far as possible that the probative strength of the evidence removed the risk of unfair prejudice. The Recorder was satisfied that in assessing probative value, he was not required to assess each piece of evidence in isolation from the rest of the evidence.

34. The judge determined that the important matter in issue in the case was that each of the accused blamed the other. The contention by Mr Fanta was that Mr Iutes's fingerprints had been found in similar circumstances on these two occasions, and this supported Mr Fanta's case that he was an innocent dupe and that Iutes was solely responsible for the drugs in the lorry. The judge concluded that the evidence in those circumstances had substantial probative value in relation to the issue of who put the cocaine in the lorry and whether one of them was unconnected with this venture. He determined this evidence was of substantial importance in the context of the case as a whole.

35. Given the conclusion as to substantial probative value and substantial importance, there was no discretion to exclude the evidence. Section 104 CJA was not relevant as this was not a propensity case and it would be a matter for the jury whether the evidence assisted them in their consideration of the issues.

The Addendum Defence Statement

36. On 6 September 2017, an addendum Defence Statement, which was unsigned and undated, was uploaded by Mr Keogh onto the Digital Case System. This occurred eight months before the trial and two days after the bad character application was uploaded. The first Defence Statement was dated 15 April 2017, four days before the officer, Mr Chisholm, signed entry 116 on the schedule of relevant non-sensitive unused material which revealed Mr Iutes's fingerprint on the receipt in Mr Bulubasa's cab. Mr Keogh in his oral evidence before us stated that the entirety of the contents of the addendum Defence Statement reflected his instructions from Mr Fanta, albeit he had overlooked to send the completed document to Mr Fanta. He accepted this was an error on his part. It set out the following:

> "**Section 5(A)(1)(a) of CPIA 1996 as amended by the CJA 2003 – The General Nature of the Accused Defence**
>
> The defendant in his first DCS stated that he was unaware of the drugs. At that stage given that the DCS was to set out his defence it was considered that this assertion of lack of knowledge was sufficient. As matters have progressed the defendant submits this further addendum DCS to clarify matters.
>
> The prosecution case is that the drugs were wrapped in a plastic bag that was the same as the plastic bags in the drivers cab. The prosecution invite thereby an inference that a person associated with the drivers cab must be responsible for the insertion of the drugs. The 2 people associated with the drivers cab are Mr Fanta

> and Mr Iutes. In police interview Mr Fanta stated that he suspected Mr Iutes was responsible for the drugs.
>
> Subsequently Mr Iutes' fingerprints have been discovered on a cash receipt in the drivers cab of a lorry driven by Savin Bulubasa that was carrying 43 kg cocaine. The Bulubasa importation was 6 weeks before the arrest of Mr Fanta. Mr Fanta submits that this association between Mr Iutes and the driver cabs in this present case and the Bulubasa case is probative of the issue between the defendants namely which of them was responsible for the drugs being put in the load.
>
> […]"

The Appeal

Fanta

37. This applicant's appeal has changed significantly in its substance between the matters relied on in the Grounds of Appeal dated 18 April 2019 and the Skeleton Argument and Perfected Grounds of Appeal Against Conviction dated 15 February 2021 (the latter document was uploaded onto DCS 11 days before the hearing of this application), on the one hand, and the submissions during the hearing before this court, on the other. As set out in writing, a number of grave assertions were made against the appellant's trial counsel, Mr Keogh, of which only a limited number formed part of the appeal as finally presented by Mr Kelly Q.C. and Ms Kenyon. The applicant relied substantively in his written submissions on a police caution which Mr Keogh accepted on 2 May 2018 for possession of Class A drugs (cocaine) on 10 April 2018, about a month before the trial. Put shortly, he had inadvertently placed a wrap of a small quantity of cocaine in an envelope containing a cheque which he sent to a set of barristers' chambers. Following the caution, on 19 December 2018, he was convicted by his professional body of i) having failed to act with integrity; ii) having behaved in a way which was likely to diminish the trust and confidence which the public places in him and his profession; and iii) having behaved in a way which could reasonably be seen by the public to undermine his integrity. He was reprimanded and fined £750.

38. In the written grounds, the appellant maintained that he was unaware of Mr Keogh's caution. He complained that throughout the trial Mr Keogh's conduct was erratic, and at times aggressive particularly whenever he asked for clarification of, or questioned, the decisions that Mr Keogh had taken on his behalf. He suggested that he was rebuffed by Mr Keogh, who *inter alia* stated, *"I've been doing this for years, I know better, don't ask"*. Fanta also asserted that Mr Keogh's overall "*demeanour and presentation*" at trial was bombastic, brusque, flushed, and he appeared to be in a rush, including when he was making submissions or presenting the appellant's case.

39. It was suggested that Mr Keogh had "*arguably* (been) *under the influence of drugs in the weeks leading up to the trial"* which directly affected his overall conduct and competence during the proceedings. It was contended Mr Keogh displayed a serious lack of judgment when making decisions. He acted, furthermore, in defiance of, and without instructions from, the applicant. The applicant additionally relied on three convictions of Mr Keogh for common assault committed against three members of the public in September 2018. It was suggested in the written Grounds of Appeal that these

convictions "*were* […] *relevant by proximity in time to Mr Fanta's trial and his complaint that he found* (Mr Keogh) *to be brusque in his manner. This evidence further sheds light on* (Mr) *Keogh's overall conduct and state of mind at the time, in the space of 6 months accumulating four convictions*". As it transpired, these three latter convictions were not the subject of any submissions during the hearing of the appeal.

40. It would be wrong to downplay, still less to dismiss, the seriousness of these assertions. The appellant's original contention was that Mr Keogh had behaved in a wholly unprofessional way, in part because he was labouring under the influence of cocaine, either whilst preparing the case or during the trial, or both. Either way, it was asserted that cocaine had impaired his competence and performance. Additionally, it was submitted that his convictions for common assault supported the suggestion that his personal conduct, for instance by behaving brusquely, was wholly unprofessional. In the event, in essence none of these allegations have been supported by evidence. The single judge in referring the application to the full court ordered, *inter alia*: "*12. At present there is no witness statement from the applicant to substantiate the assertions in the grounds of appeal. This must be remedied, to a timetable set by the Registrar*". Although it was quite clear, therefore, that a sustainable foundation for the allegations against counsel needed to be provided, no application to introduce evidence from Mr Fanta (by way of Form W) was submitted in advance of the hearing of the appeal. Instead, a completed Form W was received 7 days **after** the hearing of the appeal, dated 17 March 2021, following an enquiry by the Criminal Appeal Office as to whether one had been provided. Although a statement from Mr Fanta dated 18 September 2020, entitled "*Statement in Support of Appeal Grounds*", was sent to the Criminal Appeal Office, the leave of the court was not sought to introduce this evidence. On the morning of the hearing, the court was told that the appellant did not propose to seek leave to give evidence in person. In the result, there is no support for the assertions as to the alleged behaviour by Mr Keogh towards Mr Fanta. There is, therefore, simply no substance to the truly serious contention that Mr Keogh had prepared or conducted the appellant's defence impaired by, or under the influence of, class A drugs. No evidence has been called from any of those who attended the trial to support the allegedly bombastic, brusque, flushed, erratic, rushed and aggressive behaviour as alleged in the Grounds of Appeal. None of these allegations were put to Mr Keogh when he gave evidence. The court refrained from enquiring into matters covered by legal professional privilege, but it has been a source of particular concern to us that there was a significant lack of clarity as regards the basis on which this appeal was to be presented until the commencement of the hearing. Allegations of the utmost seriousness were advanced in writing, only to be abandoned at the last moment. Mr Keogh would have been expecting to be cross-examined in accordance with these grave assertions.

41. It has been necessary, therefore, to disentangle the grounds that were advanced during the hearing from the grounds that have not been pursued. The matters relied on by Mr Kelly in his oral submissions are all linked to the strategic approach Mr Keogh adopted as regards Mr Iutes, together with a suggestion that he misled the court as to whether Mr Bulubasa had been convicted. They can be summarised as follows:

    i) Mr Keogh pursued a cut-throat defence in a joint enterprise case when this tactic was unjustified.

    ii) Mr Keogh uploaded an addendum to the Defence Statement on 6 September 2017 without the appellant's knowledge or consent.

iii) Mr Keogh advanced the bad character application against Mr Iutes "*without any authority or instructions*" from the appellant.

iv) In making the bad character application Mr Keogh misled the judge and the jury into concluding that Mr Bulubasa had been convicted of being knowingly concerned in the importation of cocaine into the United Kingdom.

42. Notwithstanding the submissions or assertions that have been advanced as to what the appellant allegedly knew or did not know or what Mr Keogh said or did not say, the only evidence before this court, in addition to the evidence at trial and Mr Keogh's disciplinary and criminal findings, came from Mr Keogh and Ms Sabina Postolache who testified before us and were both cross examined, first, by Mr Johnson for the respondent and, thereafter, by Mr Kelly for the appellant. We intend to limit our analysis to the evidence that is properly before this court, as opposed to allegations that were unsupported by fresh evidence.

43. Mr Keogh testified that he acted for Mr Fanta throughout the proceedings, and he indicated Mr Fanta did not express any dissatisfaction with his representation. He was not under the influence of cocaine whilst preparing for the trial or during it (and, as just rehearsed, he was not cross examined to the contrary). He conferred regularly with Mr Fanta, before and after court and during breaks. Their working relationship was good.

44. The amended defence statement was not seen in advance or signed by Mr Fanta, which, as set out above, Mr Keogh accepted was an error, albeit it reflected his instructions (see [36] above). Furthermore, the bad character application was made in accordance with Mr Fanta's express instructions, and it was discussed with him, originally in conference and subsequently during the trial. There was a conference on Friday 1 September 2017, which was reflected in a brief note prepared by Ms Postolache. The risks of a cut-throat defence were canvassed, and they were considered worth taking. Mr Keogh explained that the evidence suggested that at least one of the defendants was involved, and Mr Fanta's express instructions were that Mr Iutes had been a party to the importation.

45. Mr Keogh had previously represented Mr Bulubasa, but he had not heard the name of Mr Iutes before Mr Fanta's prosecution. Again, as set out above, he became aware of the Iutes fingerprint evidence only through prosecution disclosure of unused material in the present trial at some point after 28 April 2017 (see [29] above). Mr Bulubasa's acquittal was referred to explicitly in the unused material; all counsel in the Fanta and Iutes cases were aware of it. Mr Keogh believed the judge had also been informed, although he could not be sure. He considered Mr Bulubasa's acquittal to be inadmissible, although he would have wished to introduce it in evidence.

46. Ms Sabina Postolache is now a solicitor at Alexander JLO, and at the time of the trial she was a paralegal under the supervision of a partner at the firm. She was with Mr Keogh at the conference with Mr Fanta on Friday 1 September 2017, shortly before the trial was originally due to begin. She remembered Mr Fanta saying that Mr Iutes was the only person other than him who could have placed the drugs on the lorry. She thought this was important, and hence she made a note of it in a brief attendance note ("*Iutes only one that could've done*") as shown to the full court. Mr Keogh told Mr Fanta about the Iutes fingerprint evidence in the unused material. Mr Fanta said that this discovery confirmed

his suspicions ("*this is it*") and agreed that this evidence should be part of his case, and that Iutes should be blamed for the drugs in the lorry. Ms Postolache attended some of the trial. Mr Fanta seemed pleased with the way it was being run.

47. Mr Kelly submits that it was "*wholly unreasonable*" for Mr Keogh to have advanced a cut-throat defence. He argues that the defence presented by Mr Keogh "*ran wild*" and the tactics amounted to "*real incompetence*". We profoundly disagree with Mr Kelly's analysis. In our view, there was no choice but to recognise the inevitable logic dictated by the evidence in the case. The two applicants disagreed about how and where they met, along with the arrangements for the trip. They gave conflicting accounts as to whether it had originally been agreed that Mr Iutes was going to undertake the Channel crossing. Neither identified a credible third person who could have loaded the drugs onto the lorry, whilst being in a position to retrieve them in the UK. As we have already set out, this was a paradigmatic cut-throat defence; indeed, it was inescapable that each accused would ultimately be led into implicating the other in order to seek an acquittal, given they were the two most likely individuals to have committed this offence, either together or separately. Counsel for each applicant cross-examined the co-accused and made final speeches on this basis. In any event, we accept unreservedly the evidence of Mr Keogh and Ms Postolache that the case was advanced in accordance with Mr Fanta's express instructions: he blamed Mr Iutes for the illegal importation from the start of his interviews with the police ("*someone else has, er, loaded the vehicle and all my personal suspicions are now aimed at that person*"), and he had good reason to support the introduction of the bad character evidence, which we accept he said confirmed his suspicions about Mr Iutes's responsibility for this criminality.

48. Mr Kelly is correct to observe that cut-throat defences often involve consequential damage to those who advance them. However, this is simply one of the factors in criminal cases that sometimes need to be confronted and on occasion – as in the present case – it is an unavoidable feature of the trial process. Mr Kelly highlights that Mr Body in cross-examination of Mr Fanta asked him whether he had ever spoken to Mr Bulubasa and whether he had been recommended Mr Bulubasa's defence lawyers. Mr Fanta denied any previous knowledge of Mr Bulubasa. Moreover, in his closing speech, when addressing the suggested coincidence of the two contemporaneous Channel crossings of Bulubasa and Mr Iutes, Mr Body made a comment to the effect that, "*It is a greater coincidence that Mr Fanta happens to be represented by the same legal team as Mr Bulubasa. Coincidences do happen. It is certainly not evidence against Mr Iutes*". Mr Kelly contends that this comment was "*fraught with error*" which was *"compounded by* (Mr Keogh's) *silence*" and was "*highly prejudicial*". He criticises Mr Keogh for not intervening and for failing to apply for the jury to be discharged. We consider this submission to be without merit. Analysed strictly, Mr Body did no more than juxtapose two different situations so as to make the remark that coincidences can be without meaning. Mr Body did not suggest that there was anything unprofessional or suspicious in Mr Keogh accepting instructions from both men or that his association as an advocate with these two accused was to be held against Mr Fanta. If there was, nonetheless, a secondary or subliminal contention being advanced by Mr Body in cross-examination and in his closing speech (by highlighting the coincidence of a connection between Mr Fanta and Mr Bulubasa via their legal representative), Mr Keogh would only have underscored any slight prejudice that had been created by raising the matter in front of the jury. An application for a retrial on this slender basis would have been bound to fail.

If requested, the judge could have dealt with the point in the summing up, but this again would have served to draw attention to a passing observation in the co-accused's closing speech which, on analysis, was directed at the fact that coincidences can be without meaning. That both men had used the same criminal lawyer was clearly a factor without any significance.

49. Additionally, the prosecution explored in cross-examination of Mr Fanta whether he had been aware of the importation of 43 kilograms of cocaine into the UK on 18 July 2015 because he had worked in "*close harmony*" with Mr Iutes. This was denied by Mr Fanta. Contrary to Mr Fanta's written submissions, the prosecution were entitled to explore this line of questioning, which in any event was wholly unproductive. In *Edwards* [2005] EWCA Crim 1813; [2006] 1 Cr App R 3, it was held that evidence admitted at the accused's behest could thereafter be used for any relevant purpose:

> "3. […] It should be explained why the jury has heard the evidence and the ways in which it is relevant to and may help their decision, bearing in mind that relevance will depend primarily, though not always exclusively, on the gateway in s.101(1) of the Criminal Justice Act 2003, through which the evidence has been admitted. For example, some evidence admitted through gateway (g), because of an attack on another person's character, may be relevant or irrelevant to propensity, so as to require a direction on this aspect. Provided the judge gives such a clear warning, explanation and guidance as to use, the terms in which he or she does so can properly differ. […]"

50. The "*other*" suggested relevant purpose on which counsel seeks to rely should usually be canvassed with the judge before it is deployed – to ensure that the bad character material is not to be used impermissibly – but that aside, this questioning was a demonstration of the potential consequences of a defence of this kind. In the event, the suggestion that Mr Fanta knew Mr Bulubasa led to a dead end, as it was unsupported by any evidence. This complaint is without credible foundation.

51. Mr Kelly criticises the lack of a written record, or the lack of detail in the record, of some of the conferences between Mr Keogh and Mr Fanta leading up to and during the trial. This most particularly relates to the very brief note of the conference on 1 September 2017. Although a better recording could and perhaps should have been taken, we have borne in mind two principal considerations. First, a number of the meetings between Mr Fanta and his lawyers were reflected in seemingly properly compiled records. These included the occasions of attendance on Mr Fanta at the police station, and conferences on 9 February 2017, 18 April 2017 and 1 September 2017. More particularly, reflecting no doubt the realities of modern-day digital communication, there were 76 emails between Mr Fanta and Ms Postolache in the period 17 December 2015 – 25 May 2018. Some of these were essentially formal in nature but others dealt with the substance of the case, including the process of preparing Mr Fanta's comprehensive proof of evidence.

Second, with a few exceptions such as whether the accused is to give evidence and a decision not to call alibi witnesses, the tactical decisions during a trial are for counsel/the advocate to make: *Farooqi* [2013] EWCA Crim 1649 per Lord Judge CJ at [107]-[108]. It is sensible to discuss these matters with the defendant and to take into account his or her views, which should be recorded if practicable, at least in outline (as strongly recommended by this court in *Anderson* [2010] EWCA Crim 2553 at [52]), but ultimately decisions such as whether to advance a cut-throat defence are for counsel/the advocate. Furthermore, we are wholly satisfied that Mr Fanta was informed that there was to be a bad character application and that a cut-throat defence was to be advanced and that he positively supported these tactics. It is to be observed finally that although the note on 1 September 2017 was brief, the central record for the purposes of this application was clear: "*Iutes only one that could've done*". We have no doubt that this reflected Mr Fanta's instructions to Mr Keogh and Ms Postolache. When cross-examined, Mr Fanta was reluctant to put it any higher than expressing his suspicion that Mr Iutes was responsible for this criminality. This is unexceptional. It frequently happens that, whilst in the witness box, an accused who is running a cut-throat defence pulls back, at least to an extent, when asked to point an accusing finger directly at another occupant of the dock.

52. Mr Kelly made much of a suggested uncertainty as to whether the judge and counsel (other than Mr Keogh) knew that Mr Bulubasa had been acquitted. He sought to rely on an email provided shortly before the hearing of the present application sent, we were told, by prosecuting counsel at trial, Mr Wright, which included the observation that although he could not be 100% certain, he was "*pretty sure*" he did not know Mr Bulubasa had been acquitted. There was no application to receive fresh evidence under section 23 Criminal Appeal Act 1968, no Form W was submitted until six days after the hearing (following an enquiry from the Court of Appeal Office), and no submissions were advanced as why the court should consider a brief email rather than the witness's live testimony. There was no explanation as to why this was being dealt with at the last moment, in this wholly unsatisfactory manner. We note that there is no indication as to whether Mr Wright had been reminded of the entry on the prosecution's schedule of relevant non-sensitive unused material at item 109, *"Bulubasa was charged with being knowingly concerned in the importation* (of cocaine) *and subsequently stood trial at Snaresbrook Crown Court in January 2016. The jury returned a verdict of not guilty"* which we presume, as prosecution counsel, he would have read. Instead of applying to introduce evidence from Mr Wright following the relevant procedures (*viz.* submitting a Form W, together with a statement from the witness in the form prescribed by section 9 Criminal Justice Act 1967) the court was provided with this brief document and "*invited to indicate its stance as to the contents of the email*", a step the Court declined to take. This was a wholly inappropriate way to approach introducing evidence in the Court of Appeal (Criminal Division). Applications should be made in conformity with the court's procedures, which will afford the respondent appropriate time to provide considered submissions; thereafter, the court will be able to decide whether to admit the evidence, either as a document or by way of live evidence. In the event, we decline to admit this material which, in the form presented and given the significant uncertainties, has no weight.

53. In these circumstances, we are unpersuaded that there is any substance to the complaint that Mr Keogh deliberately misled the court as to whether Mr Bulubasa had been

convicted or acquitted, particularly bearing in mind the entry at item 109. We would add that since this was a cut-throat defence, it would have been advantageous (rather than, as suggested by Mr Kelly, to be disadvantageous) for Mr Bulubasa's acquittal to have been presented to the jury, as it would have been an added pointer to Mr Iutes' culpability in relation to the earlier trip (*viz*. if not Mr Bulubasa, then it was more likely that Mr Iutes was responsible). There is no logic to the contention that Mr Keogh deliberately withheld this information.

54. It is submitted that the judge permitted the prosecution to follow an impermissible line of cross-examination, in that Mr Fanta was questioned at length on Mr Iutes's interview when the latter had yet to give evidence and it is suggested that prosecuting counsel put the case on a wrong factual basis, without correction. Although Mr Iutes's interview was not evidence against Mr Fanta until Mr Iutes gave evidence about its contents, in the event he did testify and he was asked about the interview. Questions, furthermore, could have been legitimately framed during cross-examination on the basis of the contents of his interview without creating the impression that its contents, at that stage, were admissible against Mr Fanta. This complaint is without substance. We consider that the complaints additionally pursued as to suggested mistakes by prosecuting counsel in the case that the Crown put in cross-examination are without substance. None of the examples cited cause us any concern as to the safety of the conviction and in the main they were corrected or neutralised, for instance by Mr Fanta in the way he answered the questions.

55. In the circumstances, the Grounds of Appeal advanced by Mr Kelly are not made out, and in our judgment Mr Fanta's conviction is safe.

Iutes

56. On behalf of Mr Iutes, it is submitted by Mr Beechey that the bad character evidence relating to the applicant's fingerprint on a receipt should not have been admitted because:

i) There was never a proper basis to trigger section 101(1)(e) CJA as Mr Fanta was not advancing a cut-throat defence either explicitly or impliedly;

ii) Mr Keogh was responsible for an incompetent decision to advance a cut-throat defence when this was not justified;

iii) The evidence did not in any event constitute bad character evidence as defined by the CJA;

iv) The evidence did not pass the substantial probative value test in section 101(1)(e) CJA and it was not capable meeting the relevant test;

v) The evidence, if it was bad character evidence, was such as to be likely to lead to satellite litigation and a loss of focus by the jury as to the real issues in the case;

vi) If it was not bad character evidence, there was no basis on which the evidence could be admitted as it was irrelevant; and

vii) The admission of the evidence was prejudicial and introduced the concept of propensity to commit similar offences to that with which he was charged, that did not exist on the evidence.

57. In the alternative, if the evidence was correctly admitted, then the conviction is unsafe because the judge:

i) Failed to control the extent and use that the evidence could be put to, and by whom it could be deployed; and

ii) Failed to direct the jury in relation to any of the matters set out in the Crown Court Compendium at Chapter 12-2 and 12-7, namely purpose, weight, prejudice, credibility and that they must not convict solely on the basis of it.

58. These submissions are broadly supported by Mr Fanta.

59. The first issue that falls for consideration has been addressed above, namely whether there was a proper basis to trigger section 101(1)(e) CJA ("*it has substantial probative value in relation to an important matter in issue between a defendant and a co-defendant*"). As we have already concluded, Mr Fanta was advancing a cut-throat defence. Moreover, the authorities are clear that whether or not the accused are directly arguing that the other had committed the offence, if both were impliedly doing so because the only logical consequence was that the offence must have been committed by the other defendant, then this constitutes an important matter in issue (see *Phillips* [2011] EWCA Crim 2935; [2012] 1 Cr App R 25 (332): "44. […] *The important matter in issue in a "cut-throat" case may, as in the present case, be the issue whether either or both defendants committed the offence and, accordingly, whether one is falsely (expressly or by implication) blaming the other*. […]" per Pitchford LJ).

60. In our judgment, this was relevant bad character evidence. As set out above, Mr Iutes's explanation in the present case was that he had looked in the cupboards inside the lorry and had innocently touched the bag on which his fingerprint was found, which was from the same supermarket chain as one of the bags which contained the drugs found within the load. The credibility of that explanation was potentially significantly reduced when it was known that in the relatively recent past (six weeks before the present importation, on 18 July 2015) his fingerprint had been found on a cash receipt in the cab of the lorry entering the UK from which 43 kilograms of cocaine had been seized. The cash receipt was for a return ferry ticket bought by Mr Iutes from an agency in Dover on 14 July 2015 (*viz*. four days before this earlier importation of cocaine). In considering the credibility of the account of Mr Iutes, to the effect that he had not been involved in the present importation and that there was an innocent explanation for the presence of his fingerprint on the bag within the cab in the present case, it was relevant for the jury to consider Mr Iutes's allegedly innocent association or link on another occasion in the recent past with an importation of drugs, when his fingerprint was found on one of the documents that was directly relevant to the cross-channel trip by the lorry on which the drugs were concealed. This earlier incident potentially threw light, therefore, on the truthfulness of Mr Iutes's account that there was an innocent explanation, unconnected with the present importation of cocaine, for his fingerprint on the bag. As Mr Fanta's case was presented at trial, it would potentially have helped expose a lying defence on the part of Mr Iutes.

61. We are conscious that Mr Iutes was not charged with an offence arising out of the importation on 18 July 2015, and we have exercised particular caution as a result. However, in this context we have found assistance in the decision of this court in *R v Hay* 2017 EWCA Crim 1851. At paragraph 21 of the judgment, Simon LJ set out that:

> "[...] A "matter in issue" can arise when a defendant seeks to explain potentially incriminating evidence of association with someone involved in a crime as "innocent association" or to rebut coincidence. Whether or not an association is innocent or coincidental may be an important matter in issue between the defendant and the prosecution within the meaning of section 101(1)(d)."

62. It was for the jury to determine whether the evidence of the fingerprint on the cash receipt had a material impact on their evaluation of Mr Iutes's explanation of "*innocent association*" with the supermarket bag in the cab of the lorry on which the drugs in the present case were found. This material had "*substantial probative value*" in that it was relevant, in a substantive way, to a critical item of evidence against Mr Iutes, and it raised the critical question of whether it was simply a coincidence that his fingerprints had been found in broadly similar circumstances on two occasions within six weeks. The introduction of this evidence did not lead to satellite litigation and it was not introduced to demonstrate propensity. It was not unfair to admit this evidence.

63. The judge directed the jury as follows on this issue:

> "The prosecution say that Mr Fanta and Mr Iutes each played their part in a joint effort to get that cocaine into the UK and the prosecution say that the evidence you have heard proves that.
>
> On the other hand, Mr Fanta says that he was innocent, an innocent dupe in all this and that he was used, must have been used to get the cocaine into the UK when he had no idea at all that it was in the back of the lorry and although his actions brought the cocaine into the UK, he was not knowingly - knowingly concerned in that importation.
>
> Mr Fanta also suggests as part of his defence that the person responsible for the cocaine in the lorry is Mr Iutes, simply because well it wasn't him, he says, and therefore it must have been Iutes. As far as Mr Fanta is concerned, no one else could be responsible.
>
> Mr Fanta has, in the conduct of his defence, attacked Mr Iutes and has adduced evidence which he says will help you in deciding that he is not responsible, that Mr Iutes is. Of course, he doesn't have to prove that Mr Iutes is guilty in order for you to conclude that he is not guilty.
>
> Mr Iutes says that he was not concerned in getting the cocaine into the UK. He did some directed driving for Mr Fanta in an effort to secure employment. He had no knowledge of the drugs at all.
>
> The fingerprint found on the bag on the 9 of September in the cab of the lorry has no significance it is suggested given that he has driven the lorry and it's not the

> same as the bags in which the drugs were found. It takes you nowhere it's suggested.
>
> Further, the fingerprint on the receipt from the 15 of July 2015 is just an unhappy coincidence explained, Mr Iutes says, by the help he gave to a lorry driver he had not met before. These are the issues you are going to have to resolve, members of the jury.
>
> In considering the evidence as you do that, you may if you think it right draw conclusions from facts which you find are proved and that is sometimes - we have heard the word already in the case - called drawing an inference. You must, if you do that, always be alert to consider any other possible conclusion which could be derived from those facts. You can safely derive one particular conclusion only if you are sure that all other possible conclusions must be rejected.
>
> You must decide what conclusions you can fairly and reasonably draw from any piece of evidence that you do accept, taking these pieces of evidence together. As I have said, you mustn't engage in guesswork or speculation about matters which have not been proved by any evidence, so weigh up all the evidence and decide whether the prosecution have made you sure that a defendant is guilty. In judging that evidence you will apply your experience of life and of people and your common sense."
>
> […]
>
> "The defence, as you know, for Mr Fanta have introduced into evidence the fact that Mr Iutes, the fact of his fingerprint being found on the receipt, exhibit 14. This is because they argue that that evidence may help you answer an important issue in this case, that is who put the drugs in the vehicle. It is argued by Mr Fanta on producing that receipt and the fact that Mr Iutes' fingerprint was on it, that it is more than a lucky coincidence for Mr Iutes that his fingerprint was found in very similar circumstances on two occasions in lorries that contained cocaine. You have to decide, members of the jury, whether that evidence does help you resolve that issue and whether that helps you reach a verdict in respect of either or both defendants."

64. It is submitted that the judge failed to direct the jury as to i) the risk of unfair prejudice against Mr Iutes as a result of this evidence; ii) the use to which this evidence could properly be put; iii) the need for the jury to make their own evaluation of the evidence and not to place over-reliance on it; and iv) the need to avoid the risk of convicting him wholly or mainly on the basis of it (*i.e.* that it was only supporting evidence). We have no doubt that the judge should have given a fuller direction, broadly in line with the guidance given in Chapter 12 of the Crown Court Compendium covering expressly all of these issues. It is critical that judges, when bad character evidence is admitted, clearly explain why it has been introduced, the limits of its potential usefulness, and by their directions ensure that all of the protections for the accused against the misuse of this evidence have been properly explained. We have borne in mind the observation by Leggatt LJ in *R v Donald Adams* [2019] EWCA Crim 1363:

> "22. Looking at the matter more broadly, the general tendency of the criminal law over time has been towards a gradual relaxation of rules of evidence and an increasing willingness to trust to the good sense and rationality of juries to judge for themselves whether particular evidence is relevant to an issue they have to decide and if so in what way. But we have not yet reached the point where evidence of a defendant's bad character can be left as a free for all. [….]"

65. It remains critical, therefore, that the legal directions ensure that the jury will approach the evidence of bad character correctly, and the courts must be careful not simply to assume that juries will understand the relevance of this kind of evidence in the same way as lawyers and judges. Materially deficient directions, particularly with complex evidence, are likely to lead to the conviction being quashed, depending always on the circumstances of the particular trial.

66. However, notwithstanding the inadequacy of the present directions, the two passages set out above from the summing up made it abundantly clear why the evidence had been introduced, namely it was relevant to the question of whether (as the judge put the matter), "*it is more than a lucky coincidence for Mr Iutes that his fingerprint was found in very similar circumstances on two occasions in lorries that contained cocaine*". The jury were directed that it was for them to decide whether this evidence helped resolve that issue. This described the purpose of the evidence, therefore, with clarity. The fingerprint from the 15 July 2015 trip was expressed as being relevant to a particular aspect of the decision-making process. Although we have reflected carefully on the judge's failure to direct the jury i) against placing over-reliance on this evidence, ii) not to convict Mr Iutes wholly or mainly on the basis of it and iii) to avoid unfair prejudice, in the particular circumstances of this case and in the context of the present summing up we consider that these matters would have been wholly apparent to the jury. This evidence expressly related to the fingerprints found on two occasions, and Mr Iutes's explanation for them. He had not been charged with or convicted of criminality arising out of events on 15 July 2015, and it is inconceivable that the jury would have convicted wholly or mainly on the basis of a fingerprint found on a cash receipt relating to an entirely different journey. The judge had directed the jury not to engage in speculation or guesswork, and that they needed to reach their verdict on the entirety of the evidence. Therefore, in these very particular circumstances, we do not consider there was an appreciable risk that this evidence would have led to unfair prejudice, or that the jury would have misunderstood its true purpose as being relevant to the issue identified, or, moreover, that they would have accorded it undue evidential weight.

67. Accordingly, we are unpersuaded by Mr Iutes's submissions that, first, the bad character application should have been refused and, second, that Mr Iutes's conviction is unsafe because of the judge's directions.

Conclusion

68. We consider that the bad character issues merited consideration by the full court. Accordingly, having granted the extensions of time and leave to appeal to both applicants, we dismiss their appeals against conviction.